IN THE

Supreme Court of the United States

October Term, 1973

No. 73-947

VITO DESALVO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of *certiorari* to review an order of the Court of Appeals of the State of New York, entered March 15, 1973, unanimously affirming, with opinion [32 N.Y. 2d 12, 295 N.E. 2d 753, 343 N.Y. Supp. 2d 65; reproduced in petitioner's brief, Appendix A; decision denying motion to amend remittitur, 33 N.Y. 2d 657 (September 19, 1973), reproduced in petitioner's brief, Appendix B], and order of the Supreme Court of the State of New York, Appellate Division, First Department, entered

March 4, 1971, unanimously affirming, without opinion [36 A.D. 2d 795, 319 N.Y. Supp. 2d 582, reproduced in petitioner's brief, Appendix C], a judgment of the Supreme Court of the State of New York, County of Bronx, rendered on November 21, 1969, convicting him, after a non-jury trial before Tierney, J., of twenty-one counts of the crime of Criminal Contempt [N.Y. Penal Law, §215.50], and sentencing him to a term of three months in the New York City Correctional Institution For Men and a $500.00 fine upon one of the counts, with unconditional discharges being imposed upon the remaining counts. An unsuccessful pretrial suppression motion by the petitioner resulted in an opinion on the subject matter embraced in this petition [60 Misc. 2d 860, 304 N.Y. Supp. 2d 310; reproduced in petitioner's brief, Appendix D]. When judgment was pronounced upon him, De Salvo was freed on bail to await a final review of his constitutional claim.

Questions Presented

No viable issues remain in this case as a consequence of this Court's holding in *United States* v. *Calandra,* —— U.S. ——, 42 LW 4104 (January 8, 1974).

Statement of the Case

The early history of this case must be gleaned from papers on file in the trial court in connection with another indictment against the petitioner DeSalvo (No. 1069/69).

From those documents it appears that, on November 8, 1968, Justice Thomas Dickens of the Supreme Court of the

State of New York signed a search warrant authorizing the immediate search for gambling records and paraphernalia at the Eastchester Biltmore Gardens Restaurant, Inc., 3530 Eastchester Road, Bronx, and the immediate search of certain designated individuals, which list of names did not include the petitioner's. The warrant aforesaid was executed on November 11, 1968, somewhere around 3:00 p.m.

According to an affidavit by the petitioner's counsel, DeSalvo was in the bar identified in the last paragraph at the time of the search, with the result that his person was searched. Additionally, an automobile parked in a parking lot connected with the premises aforesaid, which vehicle was alleged to have been in the custody and control of DeSalvo, was searched. As a consequence of those actions, the police uncovered a loaded revolver, wager slips for sundry sporting events, and eavesdropping devices. On June 20, 1969, an indictment (No. 1991/69), charging DeSalvo with criminal possession of the items aforesaid, was filed in Supreme Court, Bronx County. By motion returnable September 23, 1969, the petitioner moved to suppress the items about which we have been writing, but that motion was referred to the trial court, where the possession case still remains.

Before the return of the indictment aforesaid, the petitioner was called as a witness by the November, 1968, "B" Term of the Bronx County Grand Jury. More specifically, that occurrence took place on March 7, 1969 (Grand Jury Min., p. 1b). At that time, DeSalvo gave his name and address in response to questions put to him by an assistant

district attorney (*ibid.*). Asked next what he did for a living, the petitioner DeSalvo replied, "I refuse to answer on the grounds that it may tend to incriminate me" (*ibid.*). Whereupon, the witness was excused from the grand jury room.

Upon his return, the petitioner was apprised that the Grand Jury had decided to immunize him in order to elicit his testimony (*ibid.*). The prosecutor went on to explain that the investigatory body was seeking to determine whether or not there had been a conspiracy in Bronx County to violate the gambling laws, and to determine whether or not organized crime elements, using moneys obtained from gambling and loan sharking activities, had infiltrated into legitimate business in the community aforesaid (*id.*, pp. 1b-2b). Thereafter, the prosecutor went on to explain that the immunity from prosecution did not extend to the crimes of perjury or contempt (*id.*, p. 2b).

In colloquy ensuing immediately thereafter, DeSalvo acknowledged that he had spoken to his attorney, Mr. Tobias Russo, who was outside the grand jury room, and that his counsel had advised him respecting his obligations (*ibid.*).

Subsequently, the pattern was that the petitioner would be asked a question which he refused to answer on the grounds that his response might tend to incriminate him (*id.*, pp. 2b-10b). Whereupon, he would be directed by the foreman to reply to the interrogatory, after which DeSalvo would again refuse to answer on the grounds of possible self-incrimination (*ibid.*). At a point during the examination, the petitioner was permitted, pursuant to his request,

to leave the chamber for purposes of again consulting with his counsel (*id.*, p. 7b). After taking that action, the petitioner DeSalvo continued to persist in invoking his privilege against self-incrimination (*id.*, pp. 7b-10b).

Because of the petitioner's contumacious conduct, an indictment (No. 1069/69), charging 21 counts of the crime of Criminal Contempt, was returned against him on April 7, 1969. Incidentally, the petitioner, as previously noted, was later indicted for the possessory crimes.

On August 19, 1966, the contempt case was moved to trial before the Hon. Arnold G. Fraiman (Min., 8/19/69, p. 2). At that time, Justice Fraiman and opposing counsel discussed the possibility that DeSalvo's Fourth Amendment rights had been violated when he was called before the grand jury as an outgrowth of the incident of November 11, 1968. In that connection, the prosecution conceded, for purposes of resolution of the instant problem, that the search which resulted in the petitioner's being brought before the grand jury had been an illegal one, and that, if it had not been for that search, DeSalvo would not have been summoned by that body (*id.*, p. 8).

Also noteworthy is the prosecutor's representation that all the questions asked of the petitioner before the grand jury had not pertained to the tangible items taken from the petitioner's person, but rather some were based upon information that had been learned about the petitioner Vito DeSalvo during independent investigation (*id.*, p. 3). Apropos of that subject, the record reflects that, in a memorandum of law addressed to this question, the prosecutor pointed out to the trial court that only 5 of the 21

questions asked DeSalvo had had anything to do with the seizure of property from his person and motor vehicle. In any event, the presiding jurist thought that observation irrelevant, at least when it was urged upon him in open court (*id.*, p. 4).

Apparently in accordance with Justice Fraiman's directive that formal papers should be filed, the petitioner, by motion returnable August 28, 1969, moved, pursuant to §§813(c) *et seq.* of the New York State Code of Criminal Procedure [now C.P.L., Article 710], for an order (1) declaring the November 11th search of the petitioner's person and automobile to have been illegal; (2) suppressing the tangible items that were uncovered during the search aforesaid; and (3) prohibiting the prosecution from using as evidence the questions posed to, and the answers given by, DeSalvo during the relevant grand jury proceeding on the grounds that the information and leads initiating those questions had been obtained as a consequence of an unlawful search of the petitioner's person and car.

In his prayer for relief, the petitioner requested the items just enumerated, and also that a further order dismissing the indictment be issued.

In a written opinion, Justice Fraiman denied the motion to dismiss the indictment, finding against De Salvo on the constitutional claim and also, implicitly at least, finding a failure by the petitioner to claim any conceivable constitutional protection in a timely fashion.

After the filing of the opinion just quoted, and more specifically on October 9, 1969, the case was again moved

for trial before the Hon. Charles G. Tierney (Min. 10/9/69, pp. 1-2). At that time, the petitioner waived his right to a trial by jury, and the trial was had upon an agreed statement of facts, with no witnesses actually testifying (*id.*, pp. 2-23). However, the defense noted that it took exception to the findings of Justice Fraiman (*id.*, p. 6). Also, the defense charged the prosecution with exploiting a "primary taint" of illegality by calling petitioner before the grand jury and by propounding questions to him which allegedly had been derived from the illegal search affecting the petitioner (*id.*, pp. 12-13). The stipulated record before Justice Tierney consisted of the transcript of the grand jury proceedings involving the petitioner and stipulations having to do with the regularity of those proceedings (*id.*, pp. 1-23). Essentially, the prosecutor's position on the pertinent issue was that the immunization of the petitioner in legal contemplation attenuated any "taint" of illegality stemming from the illegal search (*id.*, pp. 17-18). At the close of the proceedings just described, Justice Tierney reserved decision until the following day (*id.*, p. 20). On October 10, 1969, that jurist announced his decision finding the petitioner guilty of the 21 counts in the indictment (Min., 10/10/69, pp. 21-23). On November 21, 1969, the petitioner was sentenced to jail on one count, and unconditionally discharged as to the others (Min., 11/21/69, p. 7).

As we have seen, both New York's appellate tribunals have unanimously affirmed the conviction of the petitioner. As for that, the New York State Court of Appeals did not address the constitutional contention by DeSalvo, for the reason that it found that petitioner DeSalvo had failed to

raise that issue in a timely fashion. Accordingly, that tribunal later denied DeSalvo's motion to amend the remittitur so that it would reflect the fact that the Court in question had considered and passed upon the contention under the Constitution of the United States.

Argument

The petition herein was filed before this tribunal decided the case of *United States* v. *Calandra,* —— U.S. ——, 42 LW 4104 (January 8, 1974), and the petitioner urged that a review of the instant case would provide this Court with an opportunity to declare what effect its holding in *Calandra* would have upon the states. However, this Court, in *Calandra,* has now declared that a grand jury witness, such as the petitioner DeSalvo herein, has no constitutional right to invoke the exclusionary rule to bar questioning in these proceedings based on evidence obtained in an unlawful search and seizure. As a result, DeSalvo's plaint about deprivation of constitutional right would be unfounded even if he had properly raised and preserved the issue in the state courts.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1974